***United States Court of Appeals***

***for the Second Circuit***

# PETITIONER'S REPLY BRIEF

DOCKET NOS. ORIGINAL

# 74-2098 and 74-2132

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

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DOCKET NOS. 74-2098 and 74-2132

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CONTAINAIR SYSTEMS CORPORATION,

Petitioner,

- against -

NATIONAL LABOR RELATIONS BOARD,

Respondent,

---

ON PETITION TO REVIEW AND SET ASIDE AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD AND APPLICATION FOR ENFORCEMENT OF SAME



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## PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

ARGUMENT

In our main brief we showed that the Board acted arbitrarily, capricously and against the public interest by approving the settlement stipulation according Local 295 a non-admission clause since the Board utterly failed to take into account the organizational context in which the

Union's violent and coercive conduct occurred and Local 295's persistent and flagrant violations of the Act, and of Board and court orders designed to insure compliance with them. In view of these serious considerations, the Board should have settled the case only if Local 295 agree to formally admit its guilt.

In his effort to support the Board's settlement, the General Counsel chooses (as the Board itself did) to ignore Containair's stated objections to inclusion of the non-admission clause. Instead the General Counsel argues that the Board is vested with broad discretion which it did not abuse in this case simply because its order provides the same relief as prior Board orders, which courts have enforced. (GCB 5-11, 13).* Such routine use of this form of "remedial" authority hardly demonstrates that the Board has consciously exercised its broad discretion with due regard for the public interest which it is charged to protect. Obviously just because the Board has used the remedy before does not, without more, justify its use in a later case. The District of Columbia Circuit expressed the same opinion in IUE v. NLRB (Tiidee Prods, Inc.), 426 F.2d 1243, 1250-1251, 73 LRRM 2870, 2874-2875, cert. denied, 400 U.S. 950 (1970):

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* Numbers in parentheses preceded by "GCB" and "PB" refer respectively to pages of the General Counsel's and Petitioner's briefs to this Court.

"That indeed seems to be the misguided assumption of the Board--that it is not subject to disapprobation if it is only doing the same as it has done before. The Examiner declined to award further relief to the Union on the ground that no such step had yet been authorized by the Board. Whatever merit in administrative terms may attach to this course at the Examiner level can hardly be adduced as justification for the Board's announcement in its decision that it was continuing the order drafted by the Examiner for the reasons stated by him. This kind of circularity hardly sustains an agency's disposition of a serious question.

* * *

"The Board's assumption seems to be that application of a uniform remedy stills all legal doubts. But it is as old in philosophy at least as Aristotle, and it is settled in the law as well, that the application of an apparently uniform rule may in reality engender unfair discrimination when like measures are applied to unlike cases.

* * *

"We would not cavil with the Board's course if it appeared that no further action could lawfully be taken by the Board. But we see no basis for such a claim....

"But even if the Board declines to take the steps advocated by the Union, it may conclude that some other remedies will at least do something to advance the policies of the Act...."

Measured against the standard and rationale articulated in Tiidee, Local 295's flagrant repetition of the identical

unlawful conduct demands broader relief and not, as the Board would have it, the imposition of the same limited relief that has proved ineffective in the past.

Specifically, the General Counsel seeks to justify the inclusion of the non-admission clause on the ground that "[s]uch clauses are frequently incorporated in settlement agreements and the Board's decision to accept stipulations containing such language has received explicit judicial approval" (GCB 9). As authority for this proposition the General Counsel cites ILGWU, Local 415-475 v. NLRB (Arosa Knitting Corp.), 501 F.2d 823, 86 LRRM 2851 (D.C. Cir. 1974); NLRB v. OCAW, 476 F.2d 1031, 82 LRRM 3159 (1st Cir. 1973); and NLRB v. IBEW, Local 357, 445 F.2d 1015, 77 LRRM 2818 (9th Cir. 1971). While it is true that those cases approved the Board's acceptance of settlements containing non-admission clauses, they do not warrant enforcement of the Board's order accepting such a clause herein. Unlike the instant case, none of these cases arose in a representational context or involved a respondent who, like Local 295, is a persistent and notorious violator of the rights of employers, employees and sister unions under the Act. And most important, the charging party in those cases did not raise the same serious objections to the clause's inclusion as did Containair.

The Board's order in this case does not, as the General Counsel contends (GCB 10-11), provide an effective remedy against Local 295's excesses. In the first place, it does not furnish Containair's employees with a truthful picture from official sources of this Union's deliberate violations of the law and the extent to which those violations hurt them. This is absolutely essential since these employees will be voting in an election to determine whether or not they want Local 295 to represent them. With the non-admission clause, Local 295 is free to deny any culpability for the violent and coercive activity, and even worse, to do so with the apparent sanction of the Board.

Second, by continuing merely to impose the same remedial measures against Local 295 that it has repeatedly disregarded at will, the Board's order does not serve as an effective deterrent against the Union's persistent course of unlawful conduct and thus fails to safeguard the public interest. This conclusion is inevitable especially where, as here, the Board not only permitted Local 295 to escape culpability for its transgressions by granting it a non-admission clause but did so at almost the very same moment it issued the complaint against the Union. Certainly such action hardly breeds respect for the Act that is necessary for its effectuation. See

United States Attorney General's 1953 memorandum dealing with an analogous problem of the use of nolo contendere pleas, which states in part: "One of the factors which has tended to breed contempt for federal law enforcement in recent times has been the practice of permitting as a matter of course in many criminal indictments the plea of nolo contendere...[A] person permitted to plead nolo contendere admits guilt for the purpose of imposing punishment for his acts and yet, for all other purposes, and as far as the public is concerned, persists in the denial of wrongdoing. It is no wonder that the public regards consent to such a plea by the government as an admission that it has only a technical case at most and that the whole proceeding was just a fiasco."*

All of the foregoing leaves no doubt that the Board not only should have withheld a non-admission clause from Local 295 but should have conditioned settlement itself on the Union's formally admitting that it is guilty of the unfair labor practices the consolidated complaint

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* Quoted in United States v. Jones, 119 F.Supp. 288, 289-290 fn. 1 (S.D. Cal. 1954).

alleges.*

Furthermore, contrary to footnote 6 of the General Counsel's brief (GCB 13) and as more fully set forth in our brief (PB 24-26), the Board failed to articulate complete and adequate reasons fully supporting its according Local 295 a non-admission clause over Containair's strenuous objections. The Board's statement that the clause "did not affect the efficacy of the Board Order or Court judgment" does not suffice since the Board offered no explanation to substantiate the statement and since it did not answer Containair's specific objection to the limited nature and efficacy of the relief itself

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* Nothing in Arts Metal Construction Co. v. NLRB, 110 F.2d 148, 6 LRRM 732 (2nd Cir. 1940), on which the General Counsel relies (GCB 11-12), prohibits the Board from conditioning a settlement on a formal admission of guilt. That case merely proscribed the Board's compelling a respondent to admit guilt in a posted notice following the successful prosecution of unfair labor practice charges against him. The real objection there was that the respondent was left with no alternative but to admit guilt even though he still wished to profess innocence. Containair's proposal works no such hardship. Local 295 would have the option of either admitting guilt or litigating the issue and thus preserving its right to profess innocence even if found guilty. Indeed, Arts Metal notwithstanding, this Court only a year and a half ago approved, over Amalgamated Local 355's objection, the posting of a notice stating "We will not do such things again" following a short summary of the violations the Board found the union to have committed. Amalgamated Local 355 v. NLRB, 481 F.2d 996, 1008, 83 LRRM 2849, 2858 (1973). Adaptation of that form of notice would clearly be superior to the notice the Board ordered Local 295 to post in this case (JA39).

in light of the organizational context in which the violations occurred and Local 295's long history of unfair labor practices. Indeed, the Board's purported explanation in this case pales in comparison to the Board and Trial Examiner's detailed explication for imposing some special remedial measures against Amalgamated Local 355 because of its similar "parade of transgressions" that this Court found to constitute satisfactory articulation. Russell Motors, Inc., 198 NLRB No. 58 at 3-7 and Trial Examiner's Decision at 49-61, 80 LRRM 1757, 1759-1761, enforced sub. nom. Amalgamated Local 355 v. NLRB, 481 F.2d 996, 1006-1009, 83 LRRM 2849, 2856-2859 (2nd Cir. 1973). Moreover, the rationale the General Counsel advances in its brief to this Court cannot cure the obvious articulation defect since "[t]he integrity of the administrative process demands no less than that the Board, not its legal representative, exercise the discretionary judgment which Congress has entrusted to it." NLRB v. Food Store Employees Union (Heck's, Inc.), 417 U.S. 1, 9, 86 LRRM 2209, 2211 (1974) (emphasis added). Accord, IBEW, Local 2338 v. NLRB (Federal Pac. Elec. Co.), ___ F.2d ___, 86 LRRM 2814, 2816 (D.C. Cir. 1974). ("[T]he reasons for Board action are to be supplied by the Board, and not by counsel as its surrogate").

## CONCLUSION

For the foregoing means, this Court ought to grant the Company's petition to review and set aside the order of the National Labor Relations Board and deny the Board's petition for enforcement of its order.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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| NATIONAL ASSOCIATION OF INDEPENDENT TELEVISION PRODUCERS AND DISTRIBUTORS, et al. Petitioner, | ) | |
| v. | ) | Nos. 74-4021, 75-4026, 75-4025, 75-4024, 75-4036 |
| FEDERAL COMMUNICATIONS COMMISSION and THE UNITED STATES OF AMERICA, Repondents, | ) | |
| AMERICAN BROADCASTING COMPANIES, INC., WESTINGHOUSE BROADCASTING COMPANY, INC., CBS INC., NATIONAL BROADCASTING COMPANY, INC., WARNER BROS., INC., COLUMBIA PICUTES INDUSTRIES, INC., MGM TELEVISION, UNITED ARTISTS CORPORATION, MCA, INC., and TWENTIETH CENTURY-FOX TELEVISION, NATIONAL COMMITTEE OF INDEPENDENT TELEVISION PRODUCERS and LORIMAR PRODS., MOTION PICTURE ASSOCIATION OF AMERICA, INC., Intervenors. | ) | |

CERTIFICATE OF SERVICE

I, Michelle L. Clark and Mary C. Ross, hereby certify that the foregoing typewritten "Brief for Respondents" was served this 3rd day of March, 1975, by mailing true copies thereof, postage prepaid, to the following persons at the addresses shown below:

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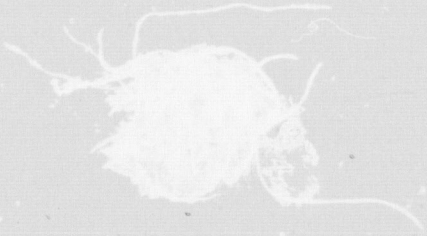

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

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CONTAINAIR SYSTEMS CORPORATION, :

Petitioner, :

- against - :

NATIONAL LABOR RELATIONS BOARD, :

Respondent. :

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AFFIDAVIT

Docket Nos. 74-2098 and 74-2132

STATE OF NEW YORK )
: SS.:
COUNTY OF NEW YORK )

DONNA GIGLIO, being duly sworn, deposes and says, that she is over the age of 18 years, that she resides at 64-33 Cooper Avenue, Glendale, New York, New York 11227, and that she is not a party to the above-entitled proceeding.

That on the 3rd day of March, 1975, she served the annexed Reply Brief, on the attorneys hereinafter named by depositing two true copies thereof to each contained in securely sealed, post paid wrappers, properly addressed to the said attorneys as follows:

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in the letter box regularly maintained and exclusively controlled by the United States Postal Service at No. 350 Park Avenue, Borough of Manhattan, New York, New York 10022.

Donna Giglio

Sworn to before me this
3rd day of March, 1975.

Joseph Warren

JOSEPH WARREN
Notary Public, State of New York
No. 03-9509180
Qualified in Bronx County
Certificate filed in New York County
Commission Expires March 30, 1976